

ARBITRATION ADVISORY

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THE ARBITRATOR'S ROLE IN SETTLEMENTS AT THE TIME OF THE HEARING

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INTRODUCTION

It is not uncommon for the subject of settlement to be raised at or before the hearing of a fee arbitration. Should the arbitrator become involved in the settlement discussions? To avoid the possible loss of neutrality and statutory immunity, the arbitrator should never participate in or mediate any settlement negotiations. However, there are certain functions the arbitrator may perform to help the parties reach a settlement.

DISCUSSION

Under Business and Professions Code Sections 6200 *et seq.*, the State Bar and local bar associations may arbitrate and/or mediate fee disputes under rules of procedure approved by the State Bar Board of Governors. Programs which arbitrate fee disputes are not required also to offer mediation; however, those programs which do, have a specific procedure in which the dispute is diverted to mediation and a trained mediator is assigned to the case. Under the rules, if the mediation fails, the matter is returned to the program for assignment to an arbitrator.

Business and Professions Code Section 6200(f) provides immunity to arbitrators and mediators only if the matter is handled "pursuant to rules of procedure approved by the [State Bar] board of governors." An arbitrator who steps out of the role of hearing officer by participating in settlement negotiations or mediating the dispute may subject not only the arbitrator, but the "arbitrating association and its directors, officers and employees," to the loss of that immunity. In addition to the possible loss of immunity, the arbitrator who participates in the settlement discussions and then goes on to arbitrate when those discussions fail runs the risk of being perceived by the parties as biased, either because of actions taken by the arbitrator during the settlement discussions or because certain information may have been disclosed which would not have been given to an arbitrator.

When sending out the notice of hearing for the arbitration, the arbitrator may

suggest that the parties discuss the possibility of settlement before the hearing. Then, at the time of the hearing, before taking testimony, the arbitrator may ask the parties if they are interested in settling. If they indicate that they are, the arbitrator should either provide another room where they can discuss the matter or the arbitrator should leave the room. If the parties ask for mediation specifically, and the bar association is also authorized to mediate disputes, the arbitrator may continue the hearing to permit the parties to contact the program administrator to arrange for mediation under the rules.

If the parties reach a settlement, either in advance of the hearing date or as a result of discussions before the hearing begins, what should the arbitrator do? One option would be to prepare an order dismissing the proceeding. However, the parties would lose rights that exist to enforce the agreement under the fee arbitration statute, specifically the right of either party to confirm the award under Code of Civil Procedure Section 1287.4 and the right of the client to ask the State Bar to assist with enforcement of an award that refunds fees and/or costs to the client (Bus. & Prof. Code section 6203(d)).

In some instances, the parties will ask the arbitrator to prepare an award based on the settlement. If parties do not ask, what action should the arbitrator take? While some arbitrators may take the position that suggesting a written award puts the arbitrator too close to the settlement discussions and is, therefore, not appropriate, others may feel comfortable doing so. The Committee takes no position on this issue, leaving it to the discretion of each arbitrator to determine his or her level of comfort in this area. The arbitrator should be cautious and very clear that s/he is not giving legal advice to either party and should refrain from any action or comment that could lead the parties to believe otherwise.

Although the arbitrator may prepare an award based on the settlement if asked to do so, the arbitrator should refrain from drafting the settlement agreement. For example, the arbitrator may want to use the award language required under the State Bar Minimum Standards and the local rules and insert what the parties specifically indicate the total amount of the fees and costs were, what the client paid, the net amount of the award and which party, if either, is awarded money. Instead of drafting findings, the arbitrator should indicate that the award was reached after settlement between the parties.

Once the arbitrator has agreed to prepare an award based on the settlement, however, the arbitrator must be comfortable that the settlement is neither unethical, illegal or unconscionable. If the arbitrator has concerns over any of those issues, the arbitrator should decline to do so. If the parties feel strongly that a written award is necessary, the arbitrator may suggest that he or she is willing to hear the matter and render an award based on the evidence. If there is any appearance that the arbitrator is no longer impartial, the arbitrator may suggest that a new arbitrator be assigned to hear the matter.

CONCLUSION

The arbitrator must not cross this line between encouraging the parties to settle and stepping out of the role of neutral arbitrator/trier of fact. While there are advantages for the parties when an arbitrator issues an award that has been reached by an agreement between the parties, the arbitrator must be very careful to maintain

neutrality and the appearance of neutrality. The arbitrator's participation in the settlement discussions in any form, whether as a settlement referee or a mediator, taints the arbitration process, and by extension, the fee arbitration program, and runs the risk of dissatisfied parties and the loss of immunity. Arbitrators should encourage settlement and provide the limited assistance available to help the parties reach that goal, but the arbitrators should never mediate or participate in any settlement discussions.